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No. 01-449

In the Supreme Court of the United States

DR. DONALD C. AUSTIN,

Petitioner,

vs.

AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REASONS FOR GRANTING THE WRIT

The AANS' Brief in Opposition argues that this dispute is a private matter between a private association and a member that has no wide-ranging implications for the judicial system.

This is simply not true.

I. THE CIRCUIT COURT'S DECISION HAS A FAR-REACHING EFFECT THAT GIVES THE AANS AND OTHER MEDICAL ASSOCIATIONS LIKE IT THE POWER TO RADICALLY CHANGE THE LAW REGARDING PROFESSIONAL MALPRACTICE

A. The Circuit Court's Decision Overturns Hundreds of Years of Common Law Precedent

Notwithstanding its dismissive rhetoric, the AANS cites no case approving punishment (civil liability, criminal punishment, or even "professional discipline") for testimony that was not knowingly false. On the contrary, the cases approve "professional discipline" only for *knowingly* false testimony (*i.e.*, perjury)—a far narrower standard than the one the AANS applied to Dr. Austin and which it (and other medical associations) hopes to apply to the testimony of other members who testify in the future. *Budwin v. American Psych. Assoc.*, 29 Cal. Rptr. 2d 453, 458 (Cal. Ct. App. 1994) (permitting discipline of a psychiatrist who "made representations to the court *knowing* that they were false or *knowing* that he lacked sufficient information to warrant them"); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (noting in *dicta* that a lawyer could be punished under the ABA Code of Professional Responsibility EC 7-13 for acts, all of which require an intent to deceive); *Silverberg v. Anderson*, 786 P.2d 365, 373-74 (Cal. 1990) (noting in *dicta* that an attorney could be subject to criminal prosecution for perjury or for violating disciplinary rules that

prohibit *knowingly and intentionally* misleading the court); *Deatherage v. State of Washington Examining Board of Psychology*, 948 P.2d 828, 832 (Wash. 1997) (permitting the state to revoke a psychiatrist's license for conduct involving "moral turpitude, dishonesty or corruption"—terms that, when applied to court testimony, require an *intent* to deceive).

Under the AANS Expert Witness Guidelines, though, a member can be punished for court testimony that is merely not "accurate and documentable". There is no requirement in the Code of Ethics that the member knowingly testify falsely or intend to deceive or mislead. All that is necessary is that the AANS' Professional Conduct Committee ("PCC") disagree with the content of the member's testimony.

In every case that involved an attempt to discipline a doctor for anything other than knowingly false testimony (*Bernstein v. Alameda Contra Costa Med. Ass'n*, 293 P.2d 862 (Cal. Ct. App. 1956), *Konrad v. DeLong*, 57 F.R.D. 123 (N.D. Ill. 1971) and *Meyer v. McDonnell*, 392 A.2d 1129 (Md. Ct. App. 1978)) the court either held or observed that these attempts at discipline by private organizations would not be allowed.

B. This Case Will Have Far-Reaching Implications

The AANS argues that this case is unimportant because: (a) there is no evidence that any other medical association will follow the AANS' lead in punishing expert testimony by its members; (b) the AANS' rules do not apply only to plaintiffs' experts; and (c) the AANS' rules are unlikely to deter expert testimony.

The AANS argues that "there is nothing in the record which supports Petitioner's baseless assertion" that the American Medical Association and other medical societies

that filed *amicus* briefs in the circuit court plan to implement expert witness rules similar to the AANS'. However, the AMA began studying such a plan shortly before Dr. Austin's lawsuit was filed in the district court.[1] It requires no great leap of logic to surmise that the AMA and other medical associations will be emboldened by the AANS' success and follow its example.

Though the AANS is correct that its Expert Witness Guidelines do not expressly refer only to plaintiffs' experts, they were written so they only ever would be applied to plaintiffs' experts. *See infra*, pp. 5-7.

The AANS argues that its Expert Witness Guidelines will not deter members from testifying because: (a) Dr. Austin continues to testify as an expert even after he was punished, and (b) there have been only twenty-three[2] prosecutions under the Guidelines.

The first contention is ridiculous. Dr. Austin has already been punished for his testimony; since he is no longer a member of the AANS he has nothing to fear from it. Why not make the best of a bad situation? The second contention fares no better. Prosecution under the AANS Expert Witness Guidelines is essentially a weapon to secure compliance. The AANS does not need to use this weapon every time, or even more than once, to send a clear message of danger that is sufficient to deter testimony.

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[1] Michael Higgins, *Docking Doctors? AMA eyes discipline for physicians giving 'false' testimony*, ABA Journal, Sept. 1998, at 20 (*cited in* Pet. for Writ of Cert., p. 15 n 4).

[2] Though the AANS claims there have been only twenty prosecutions under the Expert Witness Guidelines (Brief in Opposition at 21), its Answers to Interrogatories identified 23 such prosecutions.

II. THE AANS' ENFORCEMENT OF ITS EXPERT WITNESS GUIDELINES IS NOT "PROFESSIONAL DISCIPLINE"

The AANS Expert Witness Guidelines and procedures bear little resemblance to the "professional discipline" procedures endorsed by the cases the AANS cites. Rather, the AANS procedures offer its members a near-perfect substitute for a civil lawsuit seeking to punish a plaintiffs' expert witness for testimony.

A. "Professional Discipline" is Prosecuted by The Professional Association, Not by the Complaining Witness

In a professional disciplinary proceeding, after the complaining witness files his allegations of wrongdoing the matter is investigated and prosecuted by a presumably disinterested third party. *Deatherage* at 831 ("even if the injured party initiates a disciplinary complaint, that individual is not a party to the proceedings"). Under the AANS' procedures, though, the complaining member prosecutes the case. (Procedural Guidelines of the PCC.)

In fact, the complaining member actually retains *greater* control over the prosecution than he would in a civil lawsuit. In civil litigation, the defendant and the trial judge have numerous means to summarily dispose of a meritless case prior to trial. Under the AANS' procedures, although the PCC can issue a finding of no probable cause, the complaining witness/prosecutor has the right to overrule that decision and force the defendant to stand trial. (Deposition of Dr. Ulrich Batzdorf, p. 16.)

B. "Professional Discipline" Allows Injured Parties and the General Public to File Charges of Unprofessional Conduct

Further, the AANS' procedures cannot be called "professional discipline" because they are plainly designed and intended for the protection of AANS members, not the general public. Under any system of professional discipline, those most likely to be injured by a professional's shortcomings—his clients, customers or patients—have standing to complain. In *Budwin*, for example, the complaint that Dr. Budwin gave perjured testimony as a supposedly neutral psychological expert in a divorce proceeding was initiated by one of the parties. A disciplinary proceeding against a lawyer, which this Court implicitly endorsed in *Imbler*, can be commenced by the complaint of any person. Ill. Sup. Ct. Rule 752(a). Similarly, in *International Test and Balance, Inc. v. Associated Air and Balance Council*, No. 98 C 2553, 1999 WL 377849 (N.D. Ill. Jun. 7, 1999), the disciplinary proceeding was initiated by a complaint by the member's customer.

Under the AANS' procedures, though, only an AANS member can charge another member with unprofessional conduct. (AANS Bylaws, Art. II, Sec. 3.) Those in the best position to expose a neurosurgeon's unprofessionalism have no standing to complain. Not surprisingly, virtually all disciplinary cases before the AANS have involved court testimony, not patient care. Further, no charge of unprofessional court testimony has ever been brought against a defense expert.[3]

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[3] The AANS' denial of this fact ignores its clear interrogatory answers, which identified no prosecutions of defendant's experts. The testimony it cites in its brief is not only an attempt

(continued...)

Someone once observed that "The law, in its infinite wisdom, prohibits both the rich and the poor from sleeping under the bridges of Paris." Those laws may or may not have been intended solely to apply to the poor, but they do nevertheless. Likewise, whether or not the AANS' rules were intended solely to apply to plaintiffs' witnesses, that is their ultimate effect.

C. The AANS Never Intended Its Expert Witness Guidelines to be Professional Discipline

The Expert Witness Guidelines were adopted by the AANS in response to what it perceived as a "crisis" in medical malpractice litigation—too many verdicts against neurological surgeons.[4] Though written in even-handed language, the Expert Witness Guidelines were designed to

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[3] (...continued)
to impeach the AANS' admission, but is equivocal. Dr. W. Ben Blacket testified as follows:

> Q. Has any charge ever been brought against a doctor for anything he said as an expert witness testifying for a defendant?
>
> A. Not since I have been on the committee. Well, let me amend that. *I think* a charge was made by a Dr. Austin at one time, but then he did not prosecute that.

(Dep. of Dr. Blackett, p. 20) (emphasis added).

[4] While the AANS insists that "the current Expert Witness Guidelines were not adopted by the AANS' Board of Directors until December of 1983", (Brief in Opposition, pp. 7-8), the Guidelines adopted in 1983 are virtually identical to those adopted in 1976—the only differences are the addition of a comma and the word "the."

be applied only to plaintiffs' experts precisely because the AANS viewed them, not negligent doctors, as the problem. The AANS confirmed as much when it announced, in its 1997 Annual Report, that "The Professional Conduct Committee continues to provide a resource to *members* who may have been aggrieved by another member of the organization in a tort proceeding." (1997 AANS Annual Report at 27) (emphasis added). The AANS' Expert Witness Guidelines exist and function not to expose incompetent or dishonest neurosurgeons, but to protect them.

III. MEMBERSHIP IN THE AANS IS OF SUFFICIENT ECONOMIC IMPORTANCE TO GIVE IT THE POWER TO COERCE ITS MEMBERS INTO NOT TESTIFYING FOR PLAINTIFFS IN MALPRACTICE CASES

The AANS argues that the circuit court's opinion was correct because: (a) "[j]udicial intervention in the internal affairs of a voluntary association is only appropriate when . . . the operation of the association significantly harms an important economic interest of the plaintiff", and (b) the circuit court correctly held that Dr. Austin did not satisfy this standard. (Brief in Opposition at 9.) Neither argument is correct.

A. The "Important Economic Interest" Test Does Not Give Private Associations Free Reign to Interfere With the Judicial System

The requirement that an "important economic interest" be at stake before a court will intervene is entirely appropriate for cases involving the purely internal affairs of private association. Where there are no, or minimal, external consequences of the association's actions, this rule is appropriate.

The "important economic interest" test has no relevance, though, when the private association's actions have external consequences that violate public policy, such as interfering with the judicial system. Note, *Development in the Law – Judicial Control of Actions of Private Associations*, 76 Harv. L. Rev. 985, 1006-07 (1963). No person—neither private association nor private individual—may violate public policy by interfering with the judicial system.

B. Even if the "Important Economic Interest" Test Does Apply, Dr. Austin Satisfied It

The circuit court held that Dr. Austin had failed to show that an "important economic interest" is at stake because "Membership in the American Association of Neurological Surgeons is not a precondition to the practice of neurosurgery." (Pet. App. 7.) This is not the correct legal standard.

Treister v. American College of Surgeons, 396 N.E.2d 1225 (Ill. App. Ct. 1979), recognized a distinction between an association's discipline of current members and its decision whether to admit a prospective member, and only in the latter case required that the denial of membership be tantamount to denying the member the opportunity to practice his chosen profession. For cases involving discipline of a current member, *Treister* reaffirmed the rule articulated in *Virgin v. American College of Surgeons*, 192 N.E.2d 414 (Ill. App. Ct. 1963), in which the court reversed the plaintiff's expulsion from the association even though there was no suggestion that the expulsion would prevent him from practicing medicine.

As the trial judge in this case correctly held, a member of a private association "need not show that he will be rendered homeless or even driven to bankruptcy by its

unfair action that caused him significant economic harm." (Pet. App. 18.) Dr. Austin presented evidence showing that the AANS' actions have cost him hundreds of thousands of dollars in lost income. This satisfies the "important economic interest" standard.

IV. THE CIRCUIT COURT'S DECISION OVERRULES *DAUBERT* BY ALLOWING THE AANS TO CHILL EXPERT WITNESS TESTIMONY AND THEREBY DEPRIVE THE TRIAL COURT OF POTENTIALLY ADMISSIBLE EVIDENCE

The AANS argues that its Expert Witness Guidelines do not overrule *Daubert* because:

> The AANS' disciplinary process is an "after-the-fact" self-policing mechanism. The district court's gate-keeping role, on the other hand, involves a pre-testimony screening for reliability and relevance of the expert's opinions.

(Brief in Opposition, p. 18.) This argument is too simplistic. Any system of "after-the-fact" discipline is intended, at least in part, to secure before-the-fact compliance to some standard. As this case demonstrates, the AANS' standard is that its members may not testify as plaintiffs' experts, even where their testimony is held to be both reliable and relevant by the trial judge, if the PCC disagrees with their opinions.

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) abolished the "general acceptance" standard for admissibility of expert testimony, holding that the trial judge, not the profession, must decide whether testimony is reliable. The AANS seeks to reestablish the "general acceptance" standard for plaintiffs' experts by threatening with punishment those who would deviate from it, causing them to censor their own testimony before a trial judge has

even had the opportunity to determine whether it is reliable. (After all, if Dr. Austin had known before he testified in the *Ayers* malpractice case that his testimony (which the trial judge held was reliable) would end up costing him hundreds of thousands of dollars, he probably wouldn't have given it.) While the trial judge would still make the decision whether to admit or exclude testimony, this decision would be made in a narrower field, from which any opinion by a plaintiffs' expert that is not "generally accepted" has already been removed.

CONCLUSION

For the foregoing reasons, this Court should issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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